

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
December 17, 2008 Session

**STATE OF TENNESSEE v. SANDRA DAVIDSON**

**Appeal from the Circuit Court for Williamson County  
No. I-CR032500     Robbie T. Beal, Judge**

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**No. M2008-01260-CCA-R3-CD - Filed April 30, 2009**

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Appellant, Sandra Davidson, was placed on probation after pleading guilty to misdemeanor harassment. Subsequently, an affidavit and warrant were filed alleging that Appellant had violated probation by being arrested for possession of Schedule III and IV drugs and had failed to report the arrest to her probation officer. After a hearing, the trial court revoked Appellant's probation, ordering her to spend her original sentence of eleven months and twenty-nine days in incarceration. Appellant appeals, arguing that there is no evidence in the record to support a revocation of probation. We determine that there is substantial evidence in the record to support the violation of probation and that the trial court did not abuse its discretion. Accordingly, the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Michael J. Flanagan, Nashville, Tennessee, for the appellant, Sandra Davidson.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Ron Davis, District Attorney General, and Tammy J. Rettig, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

In June of 2007, Appellant pled guilty to misdemeanor harassment in exchange for a sentence of eleven months and twenty-nine days. The trial court placed Appellant on probation for the duration of her sentence and ordered that she have no contact with the victim.

On February 19, 2008, Jenelle Donaldson, probation officer, filed an affidavit of complaint for violation of probation and accompanying warrant for the arrest of Appellant.<sup>1</sup> In the affidavit, it was alleged that Appellant violated the following conditions of her probation:

Condition #1; The defendant has failed to obey the laws of the US by being arrested in Dickson County on 12/11/07 for possession of Schedule IV and III drugs. The court date for the new charge is set for 1/14/08.

Condition 2; The defendant has failed to report new arrest to probation officer has [sic] directed by the court.

Appellant was arrested as a result of the warrant. On April 29, 2008, the trial court held a hearing on the warrant. At the hearing, Special Agent Charles Bradley of the Tennessee Bureau of Investigation (“TBI”) testified that on July 20, 2007, he participated in a sting operation that involved the Drug Enforcement Agency, the TBI Drug Task Force, and other members of law enforcement. The law enforcement officials were acting on a tip from Federal Express. Special Agent Bradley posed as a Federal Express employee and delivered a package containing 300 Hydrocodone pills to Appellant at Sandilly’s Bar and Grill, a Dickson, Tennessee business owned by Appellant. The package was addressed to the business. When Special Agent Bradley delivered the package, Appellant was “happy” to see that it arrived. When she went back inside the bar, “she took the package and put it over her head as if she was showing everybody the package had come in.” Special Agent Bradley later participated in a search of the business in which law enforcement personnel recovered “various prescription pills throughout the place; mail matter from Houston, Texas; . . . newspaper articles about pain clinics. . . and a little over \$17,000 in cash.” The package that Special Agent Bradley delivered to Appellant came from Texas. Appellant claimed that she was “set up.”

Counsel for the State entered a certified copy of a presentment filed on December 11, 2007, by the Dickson County Grand Jury charging Appellant with possession of Schedule III drugs with the intent to deliver or sell and possession of Schedule IV drugs with the intent to deliver or sell.

At the conclusion of the proof, counsel for Appellant moved to dismiss the warrant because there was “no testimony from the affiant on the violation of probation, . . . no proof in the record that this is a willful violation, [and] no proof of what the rules were, what rules were violated. . . .” Counsel for Appellant further argued that there was no proof that Appellant failed to report the new arrest to her probation officer. The trial court dismissed “Condition two” from the violation but denied the motion to dismiss with regard to “Condition One,” taking judicial notice of the rules of probation. The trial court determined that the evidence showed Appellant violated her probation. Specifically, the trial court commented:

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<sup>1</sup>This was actually the second warrant for a violation of probation filed against Appellant. The first warrant was dismissed by the State when it was determined that the allegations did not warrant a violation of probation.

In this particular case, however, we have got some more facts that the agent was able to testify to that causes the Court to believe that it does have the authority to violate on this issue. Obviously I'm not held to the standard of beyond a reasonable doubt for this particular accusation or charge, and the Court believes that because there were questions showing her anticipation of the package being delivered, her enthusiasm that the package was delivered, and then to some degree - - much lesser extent - - I guess, for lack of a better term, showing it off to other patrons or other people in or at the near entrance to the bar, that's more than just delivery of a package, opening it, and surprise, there's Hydrocodone in there. The Court believes that there's enough here to warrant a violation of probation.

. . . .

The State's met their burden with regard to [Appellant] on Condition One, I think she should be violated. And with all due respect to you, Ms. Davidson, I think you should serve your sentence - - the original sentence imposed in this case.

Appellant appeals the judgment of the trial court.<sup>2</sup>

#### *Analysis*

Appellant argues on appeal that "there is no evidence in the record that would support a revocation of probation." Specifically, Appellant complains that there is "no testimony from the affiant on the probation violation warrant" and "no evidence that [Appellant] was even on probation; no evidence as to the rules of her probation; no evidence as to what rule(s) she may have violated." The State disagrees, claiming that "the facts and circumstances as presented to the court support its decision that [Appellant] possessed schedule III and IV controlled substances in violation of the terms of probation."

A trial court may revoke probation and order the imposition of the original sentence upon a finding by a preponderance of the evidence that the person has violated a condition of probation. T.C.A. §§ 40-35-310 & -311. After finding a violation of probation and determining that probation should be revoked, a trial judge can: (1) order the defendant to serve the sentence in incarceration; (2) cause execution of the judgment as it was originally entered, or, in other words, begin the

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<sup>2</sup> Although not raised on appeal, we are concerned about the trial court's denial of an appeal bond in this case. After revoking the defendant's probation, the defendant requested an appeal bond. The trial court denied bond stating "I don't think I've ever set a bond in a violation of probation hearing . . . I see no reason to do it here." Pursuant to Tennessee Code Annotated section 40-26-102, the granting of an appeal bond in a felony case is a discretionary matter under most circumstances. However, Rule 32(d)(1) of the Tennessee Rules of Criminal Procedure provides a defendant in a misdemeanor case with "a right to have bail set or to be released on recognizance pending the exhaustion of all direct appellate procedure in the case." See also Tenn. Code Ann. § 40-26-104. This right to an appeal bond applies equally when a misdemeanant appeals from a revocation of probation. Tenn. R. Crim. P. 32(g). Therefore, the trial court should have granted the defendant's request for an appeal bond.

probationary sentence anew; or (3) extend the probationary period for up to two years. *See* T.C.A. §§ 40-35-308(c) & -311(d); *State v. Hunter*, 1 S.W.3d 643, 647 (Tenn. 1999). “The decision to revoke probation is within the sound discretion of the trial court, and its judgment will be reversed only upon a showing of an abuse of discretion, reflected in the record by an absence of substantial evidence to support the trial court’s decision.” *State v. Terrell E. Payne*, No. M2007-02673-CCA-R3-CD, 2008 WL 5263634, at \*2 (Tenn. Crim. App., at Nashville, Dec. 18, 2008) (citing *State v. Gregory*, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997)).

“In probation revocation hearings, the credibility of the witnesses is for the determination of the trial judge, who is in the best position to observe witness demeanor.” *State v. Beard*, 189 S.W.3d 730, 735 (Tenn. Crim. App. 2005) (citing *Bledsoe v. State*, 387 S.W.2d 811, 814 (Tenn. 1965); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. 1980)). Instead, we are to determine from the record whether there was “no substantial evidence” to support the trial judge’s conclusion that a violation had occurred. *Id.*

While we recognize that a new arrest and pending charges are proper grounds on which a trial court can revoke a defendant’s probation, a trial court may not rely on the mere fact of an arrest or an indictment to revoke a defendant’s probation. *See State v. Harkins*, 811 S.W.2d 79, 83 n.3 (Tenn. 1991). A revocation on this basis requires the State to “produce evidence in the usual form of testimony” in order to establish the probationer’s commission of another offense while on probation. *State v. Walter Lee Ellison, Jr.*, No. 01C01-9708-CR-00361, 1998 WL 272955, at \*2 (Tenn. Crim. App., at Nashville, May 29, 1998); *see State v. Michael Chaney*, No. 01C01-9801-CC-00010, 1999 WL 97914, at \*1 n.2 (Tenn. Crim. App., at Nashville, Feb. 18, 1999).

A trial court has statutory authority to admit trustworthy and probative evidence, including hearsay, for sentencing purposes. T.C.A. § 40-35-209(b); *State v. Chambless*, 682 S.W.2d 227, 233 (Tenn. Crim. App. 1984); *State v. Flynn*, 675 S.W.2d 494, 498 (Tenn. Crim. App. 1984). “Reliable hearsay” is admissible in a probation revocation hearing so long as the opposing party has a fair opportunity to rebut the evidence. T.C.A. § 40-35-209(b). It is generally recognized that in order to prevail in a revocation proceeding based upon allegations of criminal misconduct, the State must show by a preponderance of the evidence that the defendant violated the law. *See State v. Michael Harlan Byrd*, No. 01C01-9609-CC-00411, 1998 WL 216859, at \*7 (Tenn. Crim. App., at Nashville, May 1, 1998). The State need not show a conviction for the new offense, but it should show by a preponderance of the evidence that the defendant violated the law. *See State v. Andrew B. Edwards*, No. W1999-01095-CCA-R3-CD, 2000 WL 705309, at \*3 (Tenn. Crim. App., at Jackson, May 26, 2000), *perm. app. dismissed* (Tenn., Sept. 11, 2000).

Although it appears that the affidavit in support of the probation violation warrant was never made an exhibit at the revocation hearing, it is in the technical record and was obviously reviewed by the trial judge since he issued the revocation warrant. We believe this is sufficient for this Court to review this case on the merits. *See State v. Bobadilla*, 181 S.W.3d 641, 644 (Tenn. 2005). In addition the trial court properly took judicial notice of the condition of probation Appellant violated.

*See Delbridge v. State*, 742 S.W.2d 266, 267 (Tenn. 1987) (holding court may take judicial notice of court records in earlier proceedings of same case).

Finally, while the failure to present testimony of the probation officer is unusual, it is not fatal to the revocation proceeding. In this instance, the State presented the testimony of Special Agent Bradley who personally observed Appellant's violative actions. Special Agent Bradley delivered the package to Appellant, who expressed her excitement at its delivery. We note that although Special Agent Bradley did not have a lab report confirming the identity of the pills that were inside the package, he testified that the TBI confirmed the pills were, indeed, Hydrocodone. By possessing Schedule III and Schedule IV narcotics, Appellant violated that condition of probation. There was substantial evidence in the record presented in the form of testimony by Special Agent Bradley to support the trial court's finding that Appellant violated a condition of her probation. Accordingly, the trial court did not abuse its discretion. Appellant is not entitled to relief on this issue.

#### *Conclusion*

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE